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No. 80-1611

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NORMAN H. SHILLING,

Appellant,

v.

STATE COMMISSION ON JUDICIAL CONDUCT,

Appellee.

ON APPEAL FROM THE STATE OF NEW YORK
COURT OF APPEALS

MOTION TO DISMISS APPEAL OR AFFIRM ORDER APPEALED FROM

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Questions Presented

1. Whether a substantial federal question meriting review by this Court is presented by a provision of the New York State Constitution, empowering the New York Court of Appeals, on review of a determination of the State Commission on Judicial Conduct, to impose upon a judge a more severe disciplinary sanction than the one rendered by the Commission, when such review is commenced at the request of the judge.

2. Whether such a provision is unconstitutionally "vindictive" on its face or in its application to appellant.

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Opinion Below

The opinion of the Court of Appeals, dated November 25, 1980 (A 1a-13a*), upon which the order appealed from is based, is officially reported at 51 N.Y.2d 397 (1980).

* References to documents reproduced in the Appendix to appellant's jurisdictional statement are indicated as "A", with appropriate page numbers inserted.

Jurisdiction

After the service upon him of the order of removal of the Court of Appeals, appellant, raising for the first time the federal constitutional claims advanced herein, moved in the Court of Appeals for reargument of its decision or, in the alternative, for a stay of the removal order pending further application to this Court. By order of December 17, 1980, the Court of Appeals, treating the motion as one for reconsideration, granted the motion, and on reconsideration, adhered to its original decision of November 25, 1980 (A 14a). A subsequent application by appellant to a single judge of the Court of Appeals, seeking a stay of the order of November 25, was denied the same day (A 15a).

Appellant thereupon filed a notice of appeal to this Court and, in papers dated December 22, 1980, applied to this Court for a stay of his removal pending determination of the appeal. By order dated December 29, 1980, Justice Marshall stayed the execution and enforcement of the November 25 order "pending the timely docketing and disposition of the appeal by this Court" (A 16a).

The appellee, State Commission on Judicial Conduct ("Commission"), makes this motion, pursuant to Rule 16 of this Court, to dismiss the appeal taken by Norman H. Shilling ("appellant") from the order of the State of New York Court of Appeals, entered on November 25, 1980, removing appellant from office effective December 31, 1980, on the grounds that there is no substantial federal question meriting review by this Court; or, in the alternative, to affirm that order.

Constitutional and Statutory Provisions Involved

1. New York State Constitution, Article 6, § 22(a) states:

> There shall be a commission on judicial conduct. The commission on judicial conduct shall receive, initiate, investigate and hear complaints with respect to the conduct, qualifications, fitness to perform or performance of official duties of any judge or justice of the unified court system, in the manner provided by law; and, in accordance with subdivision d of this section, may determine that a judge be admonished, censured or removed from office for cause, including but not limited to, misconduct in office, persistent failure to perform his duties, habitual intemperance, and conduct, on or off the bench, prejudicial to the administration of justice, or that a judge or justice be retired for mental or physical disability preventing the proper performance of his judicial duties. The commission shall transmit any such determination to the chief judge of the court of appeals who shall cause written notice of such determination to be given to the judge or justice involved. Such judge or justice may either accept the commission's determination or make written request to the chief judge, within thirty days after receipt of such notice, for a review of such determination by the court of appeals.

2. New York State Constitution, Article 6, § 22(d) states:

> In reviewing a determination of the commission on judicial conduct, the court of appeals may admonish, censure, remove or retire, for the reasons set forth in subdivision a of this section, any judge of the unified court system. In reviewing a determination of the commission on judicial conduct, the court of appeals shall review the commission's findings of fact and conclusions of law on the record of the proceedings upon which the commission's determination was based. The court of appeals may impose a less or more severe sanction prescribed by this section than

the one determined by the commission, or impose no sanction.

3. New York State Judiciary Law § 44(9) states:

> In its review of a determination of the commission, the court of appeals shall review the commission's findings of fact and conclusions of law on the record of the proceedings upon which the commission's determination was based. After such review, the court may accept or reject the determined sanction; impose a different sanction including admonition, censure, removal or retirement for the reasons set forth in subdivision one of this section; or impose no sanction.

Statement

The Respective Roles Of The State Commission On Judicial Conduct And The Court Of Appeals

The New York State Commission on Judicial Conduct receives complaints "with respect to the conduct, qualifications, fitness to perform or performance of official duties of any judge or justice of the unified court system . . ." (N.Y. Const. Art. 6, § 22[a]). The Commission may dismiss a complaint if it lacks merit, or it may conduct an investigation (Judiciary Law § 44[1]). Following an investigation, the Commission may decide to dismiss the complaint or file charges in a "formal written complaint" (Judiciary Law § 44[4]). A due process hearing is then held before a referee designated by the Commission (Judiciary Law § 43[2]). Ultimately, the Commission may dismiss the complaint or determine that the judge be admonished, censured or removed from office. The determination is subject to review by the Court of Appeals upon request of the judge within 30 days of receipt of the determination (Judiciary Law § 44[7]).

As set forth in the applicable Rules of the Court of Appeals ("Court Rules"), 22 NYCRR Part 530, a proceeding for review of a Commission determination is commenced by the filing of a "request for review," within the 30-day statutory period (Court Rule 530.1). Separate Court Rules regulate the time for filing and content of a "record for review" and briefs (Court Rules 530.2-530.6).

The Court of Appeals reviews the record of the proceedings before the Commission and "may accept or reject" the determined sanction. If the Court rejects the Commission's proposed sanction, the Court may impose a different sanction—any of those prescribed by law—or no sanction (Judiciary Law § 44[9]). The power to impose "a less or more severe sanction" is provided by the State Constitution (Article 6, § 22[d]).

The Court of Appeals has held that its power of review of Commission determinations is:

> unusually broad, encompassing as it does authority not only to "review the Commission's findings of fact and conclusions of law," but also to "impose a less or more severe sanction . . . than the one determined by the Commission, or [to] impose no sanction."
>
> *Matter of Spector,* 47 N.Y.2d 462, 465-66 (1979)

Thus, the issues before the Court of Appeals in every case include, "the correctness of the Commission's findings of fact and conclusions of law as well as the appropriateness of the Commission's determination." *Ibid.*

The Proceedings Before The Commission In Matter Of Norman H. Shilling

On June 4, 1979, following an investigation, the Commission served upon appellant a formal written complaint, charging that he had improperly interfered in the course

of a proceeding before another judge and lent the prestige of his office to advance the interests of a third party, Associated Humane Societies of New Jersey ("AHS"), a non-profit corporation of which he served as a trustee.

Specifically, it was alleged that between December 1977 and December 1978, appellant communicated with officials of the American Society for the Prevention of Cruelty to Animals ("ASPCA") and the New York City Department of Health ("City"), demanding that three summonses received by an AHS employee—accusing the employee of health code violations and operating an animal shelter without a license—be withdrawn, and that an operating permit be issued to AHS. His requests allegedly had been communicated in forceful and, sometimes, abusive, hostile terms. It was further alleged that, upon the calendar call of the case, appellant sat within view of the presiding judge, spoke to the judge in the courtroom after the case was adjourned and commented about the merits of the case, and, thereafter, accosted ASPCA and City officials in a public corridor outside the courtroom, identified himself as a judge, berated them in a visibly angry and profane manner, and threatened to use his political influence.

Following its receipt of appellant's answer denying most the factual allegations, the Commission referred the case to a referee to hear and report. A hearing was held on October 29, 30, 31 and November 1, 1979, at which appellant and numerous other witnesses testified. On January 24, 1980, the referee issued his report. The case was briefed and argued before the Commission, which determined that the judge should be censured.

After setting forth its findings of fact and conclusions of law, the Commission stated, *inter alia:*

> It was improper for respondent (i) to intercede in the *Esteves* case by attempting to persuade two officials of the A.S.P.C.A. with law enforcement authority to

withdraw the summonses which commenced the proceeding and to have identified himself as a judge while so doing, (ii) to interfere on behalf of the A.H.S. with officials of the New York City Department of Health as to their decision not to issue a permit to A.H.S., to have identified himself as a judge while so doing, and to have addressed the City officials in a hostile, profane and loud manner, (iii) to speak in a loud voice in the courthouse corridor with the attorney for the A.S.P.C.A. and to make reference to political influence, and (iv) to interfere in the court's consideration of the *Esteves* case by speaking to the presiding judge on behalf of the defendants. Judge Nardelli appropriately did not respond or allow himself to be engaged in conversation with respondent on this matter.

Respondent has exhibited a disturbing disregard of the ethical obligations required of all judges. He has used the prestige of his office to assert special influence on behalf of a third party and brought disrepute to the judiciary by his vulgar and abrasive public manner.

Respondent has shown little or no understanding of the standards of demeanor incumbent upon all judges as expressed in the Rules Governing Judicial Conduct. A judge's obligation to adhere to those standards is not limited to the courtroom. *Matter of Kuehnel* v. *State Commission on Judicial Conduct,* —— N.Y.2d —— (Mar. 18, 1980).

The Commission finds the blatant impropriety respondent has evinced to be seriously compounded by his refusal in this record to acknowledge that his actions even appeared improper. Respect for the judiciary has been diminished both by respondent's conduct and the appearance of impropriety thereby engendered.

(Appen. 5A-6A*)

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* References to documents reproduced in the Appendix to this motion are indicated as "Appen." with appropriate pages numbers inserted.

The Proceedings Before The Court Of Appeals And The Decision Of That Court

On April 17, 1980, appellant filed a request for review of the Commission's determination. After several extensions of time to file a brief and record were granted, appellant's brief was received on July 18, 1980. On page 1 of his brief, appellant expressed his recognition that the Court of Appeals could take any action it deemed appropriate, including removing appellant from office.

His brief stated in part:

> With full realization that under the provisions of Article "6", Section "22" of the New York State Constitution, this Court "may impose" a "more severe" sanction than the one determined by the Commission; Petitioner nevertheless seeks a reversal of the finding of the Commission on Judicial Conduct which found that he violated Sections 33.1, 33.2(a), 33.2(c), 33.5(a), and 33.5(c)(1) of the Rules governing Judicial Conduct and Canons 1, 2, 5A and 5C of the Code of Judicial Conduct, and determined that he be censured.

The Court of Appeals heard oral argument on October 8, 1980. In an opinion and orders (Appen. 7A-10A) dated November 25, 1980, the Court rendered its decision, rejecting the Commission's determination, and, pursuant to its power under New York State Constitution Article 6, § 22(d), removing appellant from office.

The Court held that:

> A Judge whose conduct off the bench demonstrates a blatant lack not only of judgment but also of judicial temperament, and complete disregard of the appearances of impropriety inherent in his conduct, should be removed from office, notwithstanding that his reputation for honesty, integrity and judicial demeanor in the legal community has been excellent.
>
> 51 N.Y.2d at 399 (A 1a)

The Court found the evidence of appellant's misconduct to be "both cumulative and reliable" (A 5a), and also found "neither reason to disturb the Commission's findings and conclusions concerning that misconduct nor any basis for holding that there was any infirmity in the procedure followed." *Id.* at 403 (A 5a).

With respect to the sanction, the Court stated as follows:

> We do, however, reject the Commission's determined sanction. We recognize that the power given us by subdivision 9 of Section 44 of the Judiciary Law to do so, is not lightly to be exercised and that the ultimate sanction of removal is not normally to be imposed for poor judgment, even extremely poor judgment (*Matter of Steinberg, supra,* at p. 81). The situation with which we deal here is clearly more egregious than that involved in *Matter of Lonschein* (50 N.Y.2d 569), where the judge sought special consideration for a license applicant but never asserted his judicial office and did no more than request expedition of the application. Here petitioner, having identified himself as a judge, nevertheless thought it not improper to request the ASPCA, the complaining and prosecuting agency, to cause dismissal of pending charges. He also asked for preferential treatment for AHS, clearly contrary to the spirit and purpose of the regulatory provisions being enforced, by requesting that he be given advance notice of when reinspection might take place. Likewise, he felt it not improper to address a remark to the Judge before whom the matter was eventually called and which impugned the motives of ASPCA and the Department of Health in seeking to enforce those regulatory provisions. That it may have been improbable that the same judge would sit when the matter was again called before the court appears, like petitioner's suggestion that he

lacks political clout, to be an afterthought which may temper but does not excuse the initial transgression. Also not improper in petitioner's mind was the threat, made on two separate occasions to Dr. Beck and during the courthouse corridor confrontation, to use political influence to obtain the ends he sought, made in intemperate tones and with the use of vulgarity. That he could be wholly unmindful of the impression that would be made upon others present in that corridor by the spectacle of a person identifying himself as a judge and speaking in loud and threatening tones of his friends in high places strongly suggests a lack of judicial temperament. Not without significance in that respect is the private admonishment of petitioner by the former State Commission on Judicial Conduct in March 1977 for having used profane, vulgar and inappropriate language in open court on several occasions in November 1976.

Compounding those four separate instances of impropriety, as the commission noted, is petitioner's continued insistence that his actions involved neither impropriety nor the appearance of impropriety. Judicial office, concerned as it is with concepts of reasonable care, arbitrariness, capriciousness, substantiality of evidence, excessiveness of discipline, involves a large measure of discretion. Public acceptance of the judicial product, however exemplary on a substantive level, cannot survive the acceptance of such invective and pressure politics as petitioner's conduct suggests. As in *Matter of Steinberg* (51 N.Y. 2d 74, 84, *supra*), we conclude "that petitioner's complete insensitivity to the special ethical obligations of Judges [renders] him unfit for judicial service."

Id. at 403-04 (A 5a-7a)

The Court confirmed the Commission's findings and conclusions except as to sanction and directed that appellant be removed from office, effective December 31, 1980, and, in the interim, suspended him with pay "except to the extent necessary to complete matters begun but not completed by him" on the date of service of the order of removal (A 7a).

Summary of Argument

There is no basis in law to support appellant's contention that it is unconstitutional for the highest court of a State to render a more severe disciplinary sanction than one "determined" by the State's judicial conduct commission when the review was initiated by the judge facing discipline. Nor is there any basis to conclude that the New York State Court of Appeals in fact punished appellant for seeking a review by that court.

1. A court may not punish a defendant for having successfully challenged some action by that court. Thus, in the absence of any "reason or explanation," increased punishment by the same court will be deemed to be "vindictive" and, hence, a violation of due process of law. *North Carolina* v. *Pearce*, 395 U.S. 711, 726 (1969).

2. An increase in punishment on resentencing by another court does not raise due process problems since it is not inherently vindictive, and there is no basis to assume that the second court has any reason to be vindictive. *Colten* v. *Kentucky*, 407 U.S. 104 (1972); *Chaffin* v. *Stynchcombe*, 412 U.S. 17 (1973).

3. Thus, no vindictiveness will be found to exist on the face of a procedure when a reasonable explanation is set forth for the increased punishment, or when the resentencing court is not the court that was the subject of the

successful challenge, since there is nothing inherently vindictive about the procedure.

4. Subjective fear that the exercise of a right would lead to greater punishment is insufficient to vitiate an otherwise proper criminal procedure. That such fear had a "chilling" effect or might deter the exercise of a right is not a violation of due process of law, in the absence of vindictiveness or retaliation for the exercise of such right. *Corbitt* v. *New Jersey,* 439 U.S. 212 (1978); *Chaffin* v. *Stynchcombe, supra.*

5. It is not unconstitutional to increase a criminal sentence on an appeal initiated by the defendant; several states provide for such procedures. Dunsky, *The Constitutionality of Increasing Sentences on Appellate Review,* 69 J. Crim. L. & Criminology 19, 20 n.8 (1978).

6. In any event, a judge facing discipline does not have the same due process rights as a defendant in a criminal proceeding, and, thus, even if it were unconstitutional to increase a criminal sentence on an appeal initiated by a defendant, such right would not be transferred to a judge who initiates a review of a Commission determination and is removed from office. Due process of law applies to judicial disciplinary proceedings, but not the "full panoply" of due process rights. *Mildner* v. *Gulotta,* 405 F.Supp. 182, 210 (E.D.N.Y. 1975), *aff'd* 425 U.S. 901 (1976); *Withrow* v. *Larkin,* 421 U.S. 35 (1975).

7. There was no actual vindictiveness in the case at bar. The opinion of the Court of Appeals was comprehensive, and fully explained the action of the Court. A reference to appellant's intransigent attitude about his misconduct was perfectly proper, in keeping with the standard test in New York whether the misconduct demonstrates the judge's unfitness for judicial office, and was not evidence that he had been punished for seeking review.

ARGUMENT

POINT I

A State Constitutional provision allowing an increased disciplinary sanction by the Court of Appeals upon a review initiated by the Judge facing discipline is not "vindictive" on its face and, hence, does not violate due process of law.

a) Appellant's misplaced reliance upon the "vindictiveness" decisions

Appellant cites the well established law that it is unconstitutional for a court to retaliate against a defendant for successfully challenging an earlier conviction. Thus, after a conviction is set aside, if the same trial court imposes an unexplained increase in the sentence (without "reason or justification") following a retrial, the harsher punishment will be viewed as inherently retaliatory. *North Carolina* v. *Pearce,* 395 U.S. 711, 726 (1969).

The *Pearce* analogy was rejected by this Court in *Colten* v. *Kentucky,* 407 U.S. 104 (1972) in which an increased sentence had been imposed after a second trial in another court. The first trial had resulted in a conviction, and the defendant exercised his right to a trial *de novo.* Because the second sentence had been imposed by a different judge, there was "little possibility that an increased sentence on trial *de novo* could have been motivated by personal vindictiveness on the part of the sentencing judge." *Blackledge* v. *Perry,* 417 U.S. 21, 26 (1974). The Court in *Colten* found that there was no "inherent" vindictiveness in such a system, and cited the "obvious" factor that there was no sound logic or reason for the second court to be vindictive:

> . . . the court which conducted Colten's trial and imposed the final sentence was not the court with whose

> work Colten was sufficiently dissatisfied to seek a different result on appeal; and it is not the court that is asked to do over what it thought it had already done correctly.
>
> *Id.* at 116-17

Similar reasoning by this Court led to the conclusion that vindictiveness was not shown when a different jury sentenced the defendant following reversal of an earlier conviction. *Chaffin* v. *Stynchcombe,* 412 U.S. 17 (1973). As this Court subsequently observed, "the jury, unlike a judge who had been reversed on appeal, could hardly have a stake in the prior conviction or any motivation to discourage criminal defendants from seeking appellate review." *Blackledge* v. *Perry,* 417 U.S. at 27. Hence "the danger of vindictiveness under the circumstances of the case was '*de minimus.*' " *Ibid,* citing *Chaffin* v. *Stynchcombe,* 412 U.S. at 26. This Court has made it clear that it is not every "possibility" of vindictiveness on resentencing that will raise due process problems. A possibility of vindictiveness becomes a due process problem only when it is "found to inhere in the . . . system" under consideration. *Ibid.*

In 1974, this Court interpreted its decisions in *Pearce, Colten* and *Chaffin* by observing that only "a realistic likelihood of 'vindictiveness' " would offend the clause, and not every instance of increased punishment. *Blackledge* v. *Perry,* 417 U.S. at 27.

And in *Bordenkircher* v. *Hayes,* 434 U.S. 357 (1978), this Court upheld the conduct of a prosecutor who offered the defendant the choice of pleading guilty to an existing charge or facing a new indictment based on a habitual offender statute carrying a much harsher sentence upon conviction. The Court reasoned that the defendant had full notice of alternatives, the second charge was fully justified

by evidence in the prosecution's possession at the time of the original indictment, and the institution of plea bargaining would be seriously undermined if prosecutors were penalized for seeking to induce guilty pleas. The element of free choice in plea bargaining was a factor in the Court's decision. The Court stated: "[T]here is no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer." *Id.* at 363.

Thus, among the factors which might lead to a conclusion that there had been vindictiveness in an increased sentence are (1) the same court imposed greater punishment following a successful challenge to that court's action; (2) the absence of any "reason or explanation" for the increased sentence; (3) the inherently vindictive nature of the process (i.e., the probability based on human experience and sound logic that retaliation for the successful challenge entered into the decision to impose more punishment).

In an attempt to come within the *Pearce-Blackledge* vindictiveness rationale, appellant offers a strained theory of vindictiveness. First, he raises the possibility of vindictiveness by an unsupported assumption that the Court of Appeals frowns on meritless, time-consuming appeals. He states (App. br. 12):

> The possibility that the Court of Appeals will impose a harsher sanction than did the Commission because of its vexation with what it perceives to be a meritless, time-consuming appeal is a possibility built into the structure of § 22, and one which cannot be ignored.

Having expressed this "possibility," he then goes on to assume its truth and builds his constitutional argument on this "possibility" as though its logic is self-evident.

The theory is then repeated to suggest that no fair-minded person could possibly suggest that the Court of

Appeals does not have an interest in maintaining a manageable caseload. Appellant states (App. br. 13):

> Surely, one could not say that the New York Court of Appeals lacks institutional interests in discouraging appeals that burden its already crowded docket—especially appeals it perceives as meritless, brought by judges (1) who ought to know better and (2) who embarrass other judges by insisting on pressing meritless points concerning their improper conduct.

Thus, in developing a theory that the Court of Appeals retaliated against appellant for exercising his right to seek review, appellant speculates that he was penalized because (1) judges "ought to know better" than to bring "meritless" appeals and (2) it is embarrassing to other judges when meritless points are urged. His speculation is not grounded on any rational experience or compelling logic. In short, it is a desperate attempt to come within the purview of the *Pearce* and *Blackledge* rationale, and, on existing law, must fail.

Appellant's theory bears no resemblance to the facts in *Pearce* and *Blackledge, supra,* which led this Court to assume that the defendants in those cases were being punished *for* having exercised their rights. That is entirely different from the result in this case where appellant was removed as a consequence of the review process (initiated by appellant).*

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* Appellant's repeated use of the word "appeal" to describe the review process is inaccurate. The Court is part of the process and has been given broad power, albeit when a judge facing discipline requests such a review. Since April 1, 1978, the Court of Appeals has reviewed ten cases: *Matter of Spector,* 47 N.Y.2d 462 (1979) (admonition accepted); *Matter of Dixon,* 47 N.Y.2d 523 (1979) (censure rejected, admonition imposed); *Matter of Bulger,* 48 N.Y.2d 32 (1979) (censure accepted); *Matter of Dier,* 48 N.Y. 2d 874 (1979) (censure accepted); *Matter of Kuehnel,* 49 N.Y.2d

(footnote continued on following page)

b) A procedure which deters or "chills" the exercise of a right, or places a "burden" on such a right, does not necessarily violate due process of law

Appellant seems to suggest that any procedure that "chills" the exercise of a right (such as the right to obtain a review of a Commission determination) constitutes a violation of due process if there is an alternative procedure that could have been implemented. He argues that since New York could have developed a review system which created no "chills," the review procedure is unconstitutional (App. br. 13-14).*

This view of the law, quite simply, is wrong. This Court does not substitute its judgment for that of a state legislature or a high state court. Any review procedure would have a theoretical alternative that would suit certain persons at certain times. "Chills" are subjective. The possibility of a "chill" will not form a basis to strike down a state constitutional procedure.

(footnote continued from preceding page)

465 (1980) (removal accepted); *Matter of Kane*, 50 N.Y.2d 360 (1980) (removal accepted); *Matter of Lonschein*, 50 N.Y.2d 569 (1980) (censure rejected, admonition imposed); *Matter of Steinberg*, 51 N.Y.2d 74 (1980) (removal accepted); *Matter of Shilling*, 51 N.Y.2d 397 (1980) (censure rejected, removal imposed); *Matter of Rogers*, 51 N.Y.2d 224 (1980) (removal rejected, censure imposed).

There is no basis from this record to support the assumptions made by appellant as to the Court's motives. Indeed, the Court has demonstrated that it has every intention to take its review responsibility seriously and has done so.

* Appellant's argument, entirely unsupported in law, is:

> "With respect to the appellate structure under consideration here, however, it simply is neither inevitable nor even necessary that the Court of Appeals should be able to impose an enhanced sanction only upon those judges availing themselves of the right to obtain review. Because New York could readily have designed its appellate review structure otherwise . . . , the substantial chilling effect . . . is unnecessary and, therefore, impermissible."

Appellant then goes further by stating (App. br. 14-19) that the sole purpose of the New York constitutional provision is to deter, and the provision for an increased sanction is "entirely unnecessary to the achievement of any legitimate purpose" (App. br. 19). This argument is absurd on its face. Obviously, the procedure achieves a legitimate purpose. It provides for full review, with a full range of action available to the Court of Appeals, and the Court's authority to act is initiated on the request of the judge facing discipline. Appellant is simply second guessing the New York State Legislature which chose the means to have the New York State Court of Appeals participate in the judicial disciplinary process. It is New York State policy to make the Court of Appeals an integral part of the process, when a judge facing discipline requests review. The Court has been given authority in such cases to make findings of fact and conclusions of law, and to exercise the full range of actions under the Constitution. The law permits the Court to increase, decrease or accept a Commission's proposed sanction of a judge in a case in which it has completed a comprehensive review. If, following such a review, the Court of Appeals disagrees with the sanction determined by the Commission, the Court may substitute its judgment and render any sanction prescribed by law. That the Court has such broad power of review only when a judge wishes to challenge a Commission determination does not render the law improper or without purpose. One may reasonably argue in favor of or in opposition to the New York policy, but one may not reasonably argue that the only purpose of the law is to punish those who exercise their rights. It need hardly be emphasized that in dealing with the conduct of judges, the highest court of a state has more than a passing interest in the integrity, reputation and fitness of judges.

Appellant's "deterrence" arguments are without substance. "Chills" and "burdens" do not raise a constitutional problem in the absence of vindictiveness, "despite whatever incidental deterrent effect they [higher sentences] might have on the right to appeal." *Chaffin* v. *Stynchcombe,* 412 U.S. at 29.*

The due process violations of *Pearce* and *Blackledge* "lay not in the possibility that a defendant might be deterred from the exercise of a legal right . . . but rather in the danger that the State might be retaliating against the accused for lawfully attacking his conviction." *Bordenkircher* v. *Hayes,* 434 U.S. at 363.

To strike down a state constitutional procedure on the flimsy rationale offered by appellant would be unprecedented. It would create an issue of constitutional proportions whenever the Court of Appeals did not do what a judge facing discipline requested the Court to do. Even the acceptance of a Commission determination by the Court of Appeals could raise the issue of "vindictiveness." A judge who faced censure or removal could argue that the Court accepted the respective determination as a message to judges not to seek review. The point is that mere speculation that a decision was vindictive is simply not

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* Appellant's reliance on *United States* v. *Jackson,* 390 U.S. 570 (1968) is misplaced. As the Court said in *Chaffin* v. *Stynchcombe,* 412 U.S. at 30, "*Jackson* did not hold, as subsequent decisions have made clear, that the Constitution forbids every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights." *Jackson* was also explained by this Court in *Corbitt* v. *New Jersey,* 439 U.S. 212 (1978): "The cases in this Court since *Jackson* have already established that not every burden on the exercise of a constitutional right, and not every pressure or encouragement to waive such a right, is invalid." 439 U.S. at 218. Thus, the Court upheld a heavier sentence after trial than the defendant would have received if he agreed to a plea in lieu of trial, and "no element of retaliation or vindictiveness" was discerned. *Id.* at 223.

what successful constitutional attacks have been based upon.

The New York Court of Appeals decided that the record before it amply demonstrated that appellant should not be a judge. That decision followed full due process in every respect. Appellant disagrees with the Court of Appeals. Presumably, he regrets having sought review. He may have made the wrong choice. He may have believed that the Court of Appeals would exonerate him, but he knew that he might be removed (App. Court of Appeals br. 1). Now he says that the law which he sought to take advantage of is unfair because it resulted in his paying a "price" for his choice. Even if in common parlance he did pay a "price" for his choice, that is not the test of constitutionality advanced by this Court's decisions cited in appellant's brief. His argument simply lacks the firm constitutional underpinnings which would strike down a state constitutional and statutory scheme for the disciplining of judges.*

c) An increased criminal sentence by an appellate court following an appeal by the defendant is not unconstitutional

The necessary implication in appellant's argument is that under similar circumstances, criminal law procedures would be struck down.

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* Appellant includes in his brief a discussion of disciplinary law procedures in the country (App. br. 16-18, n.16). In most states the high court makes the ultimate decision. Generally, misconduct commissions make recommendations which may be accepted or rejected. If a recommendation is rejected, the Court may impose a lesser or greater sanction, or no sanction. The Courts in other states in fact have removed judges following recommendations of lesser sanctions by the respective commissions. *Matter of Jordan,* 622 P.2d 297 (Sup.Ct. Oregon 1981); *Matter of Diener,* 268 Md. 659, 304 A.2d 587 (1973).

Appellant relies on the well established principle of law that rights of appeal "must be kept free of unreasoned distinctions that can only impede open and equal access to the courts." *Rinaldi* v. *Yeager,* 384 U.S. 305 (1966). He cites as an example a decision of this Court holding that when the right of appeal has been granted it may not be infringed by the denial of the right to counsel (*Douglas* v. *California,* 372 U.S. 353 [1963]).

These decisions have no bearing on the argument being made by appellant. His right to seek review was unimpeded. Indeed, he willingly and openly accepted the possibility that he might be removed from office after the Court of Appeals reviewed the record, read briefs and heard oral argument (App. Court of Appeals br. 1). When he wrote to the Court seeking review, the "determination" of the Commission became tentative. At that point only the Court could render a sanction, although it could have accepted the Commission's determination.

Several states permit increased criminal sentences on appeal by defendants. Dunsky, *The Constitutionality of Increasing Sentences on Appellate Review,* 69 J.Crim. L. & Criminology 19, 20 n.8 (1978). The constitutionality of this procedure has been upheld. See *Robinson* v. *Warden,* 455 F.2d 1272 (4th Cir. 1972); *Walsh* v. *Picard,* 446 F.2d 1209 (1st Cir. 1971); *Hicks* v. *Commonwealth,* 345 Mass. 89, 185 N.E.2d 739 (1962), *cert. denied,* 374 U.S. 839 (1963); *Kohlfuss* v. *Warden of Connecticut State Prison,* 149 Conn. 692, 183 A.2d 626, *cert. denied,* 371 U.S. 928 (1962). This Court has not struck down such a procedure. (Even if it does so, it would not necessarily affect disciplinary proceedings.)

POINT II

Assuming, *arguendo,* that a high state court could not properly increase a criminal sentence on an appeal right given exclusively to the defendant, such a principle of law would be inapplicable to the Court of Appeals decision in the case at bar.

A disciplinary proceeding is not a criminal proceeding. Although due process of law applies to judicial disciplinary proceedings, the due process rights of a criminal defendant are not transferred *en masse* to a judge, teacher or other public employee facing disciplinary charges. See, Cohn, *The limited due process rights of judges in disciplinary proceedings,* 63 Judicature 232 (Nov. 1979). The degree of due process applicable to a particular proceeding depends on the nature of that proceeding and the interests of both the government and the individual. *Goldberg* v. *Kelly,* 397 U.S. 254, 263 (1969). The "full panoply of due process protections" is reserved for an individual faced with criminal prosecution and the attendant risk of deprivation of liberty by incarceration. *Mildner* v. *Gulotta,* 405 F.Supp. 182, 210 (E.D.N.Y. 1975), *aff'd,* 425 U.S. 901 (1976). The possible loss of public employment is not analogous to the loss of liberty. *Arnett* v. *Kennedy,* 416 U.S. 134, 157 (1974). Thus, the public employee is not entitled to the same degree of due process protection as a defendant in a criminal proceeding. *Mildner* v. *Gulotta, supra.*

Indeed, the very structure of judicial disciplinary proceedings in most states would not pass constitutional muster under the criminal law. A Commission investigates, charges, designates a referee, and then determines —subject to review by the Court of Appeals—whether there has been misconduct. Appellant's constitutional challenge to that system was rejected in the Court of Appeals, and he does not raise any such issue before this

Court. Professional disciplinary proceedings conducted by an agency with investigative, charging and trial functions clearly are constitutional, the criminal law notwithstanding. *Withrow* v. *Larkin,* 421 U.S. 35 (1975).

Appellant's numerous references to a judicial disciplinary proceeding being "quasi-criminal" and the removal from office being "punitive" do not advance this discussion. Concededly, a judge has a liberty and property interest and is entitled to due process of law, but there is no precedent for the kind of wholesale transfer of criminal law rights he urges in his brief. Accordingly, the constitutional provision authorizing a greater sanction on a review initiated by a judge facing discipline is not unconstitutional on its face.

POINT III

There is no showing that the State Constitutional provision allowing an increased disciplinary sanction by the Court of Appeals was vindictive in its application to appellant.

In the case at bar, there was neither potential nor actual "vindictiveness," and thus none of appellant's rights was infringed. His brief argues that the Court of Appeals disclosed in its opinion that he was punished for exercising his right to challenge the charges (App. br. 24-25). The language in the Court of Appeals opinion which appellant believes shows actual, unconstitutional vindictiveness is (51 N.Y.2d at 404) (A 6a-7a):

> Compounding those four separate instances of impropriety, as the commission noted, is petitioner's continued insistence that his actions involved neither impropriety nor the appearance of impropriety. Judicial office, concerned as it is with concepts of reasonable care, arbitrariness, capriciousness, substantiality of evidence, excessiveness of discipline, involves a

> large measure of discretion. Public acceptance of the judicial product, however exemplary on a substantive level, cannot survive the acceptance of such invective and pressure politics as petitioner's conduct suggests. As in *Matter of Steinberg* (51 N.Y.2d 74, 84, *supra*), we conclude "that petitioner's complete insensitivity to the special ethical obligations of Judges [renders] him unfit for judicial service."

Such an argument distorts the rationale of the Court of Appeals, and ignores both the full rationale in support of the sanction and the function of a disciplinary system. Throughout the proceedings appellant demonstrated in innumerable ways that he had no understanding of what he had done or the serious consequences of a judge acting in such a reprehensible manner. The Court of Appeals did not criticize him for contesting the charges or seeking review. When a judge's entire defense and his statements throughout—from the initial stage of the proceeding to the final stage—manifest a total misunderstanding of a judge's role in society, and when the Court of Appeals reasonably concludes, based upon the full record before it, that such a judge does not know the difference between right and wrong as to basic standards of conduct, it may fairly conclude that removal from office is required. The Court also took into account a prior admonition of appellant "for having used profane, vulgar and inappropriate language in open court on several occasions in November 1976" (A 6a).

There is an irony to the argument that the Court of Appeals demonstrated actual vindictivness by its brief reference to "petitioner's continued insistence that his actions involved neither impropriety nor the appearance of impropriety." The Commission also had criticized appellant for showing "little or no understanding" (Appen. 6A) of the relevant ethical standards, and reasoned that appellant's "blatant impropriety [was] . . .

seriously compounded by his refusal in this record to acknowledge that his actions even appeared improper" (Appen. 6A). There is no suggestion that the Commission had been "vindictive" or had "retailated" for appellant's continued insistence that he had not engaged in misconduct. To fashion a showing of actual vindictiveness by the Court of Appeals on identical rationale used by both the Commission and the Court of Appeals is palpably absurd. Clearly, neither the Commission nor the Court of Appeals was being vindictive.

It is true that the Commission chose not to determine that appellant should be removed for his conduct. But the Court had the authority to disagree with the Commission and to impose an increased sanction, and it did. If a record on review discloses to the Court of Appeals that a judge is unfit for judicial office, the Court will order the judge's removal. That is the standard in New York (*Matter of Kane,* 50 N.Y.2d 360, 364 [1980] ["The petitioner has demonstrated his unfitness for judicial office"]; *Matter of Steinberg,* 51 N.Y.2d 74, 84 [1980] [" . . . petitioner's complete insensitivity to the special ethical obligations of judges rendered him unfit for judicial service"]), and the Court of Appeals concluded that on the record in this case appellant demonstrated "complete insensitivity" to the ethical obligations of a judge, and he was, thus, "unfit" for judicial service. 51 N.Y.2d at 404 (A 7a).

That appellant seems to confuse the distinctions between being removed *for* seeking review and being removed *as a consequence of* seeking review is reinforced by the opening paragraph (App. br. 24) to his point that the law violates due process in its application to him. There he states at some length that "[H]ad he not appealed . . ." he would have been censured. That is a truism but altogether irrelevant on the constitutional issues presented to this Court.

To make the point of actual vindictiveness he presents an analysis of other, unrelated cases, in which judges were treated "less severely" (App. br. 25, n.23). Because such an argument is not productive and not helpful to the issues before this Court, no detailed rebuttal is offered. These are cases decided on different facts. They involve different judges, and they were decided in a different forum. Moreover, appellant's situation is distinguishable from the others cited in his brief in that his misconduct occurred after he had been admonished for using profanity in court on other occasions.

CONCLUSION

The appeal should be dismissed in all respects because there is no substantial federal question meriting review by this Court. In the alternative, the order of the Court of Appeals, entered November 25, 1980, should be affirmed.

Respectfully submitted,

GERALD STERN
Counsel to Appellee
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New York, New York 10017
(212) 949-8860

Dated: New York, New York
April 17, 1981

APPENDIX

APPENDIX

Determination

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to

NORMAN H. SHILLING,

a Judge of the Civil Court of the City of New York, Kings County.

BEFORE: Mrs. Gene Robb, Chairwoman
Honorable Fritz W. Alexander, II
David Bromberg
Honorable Richard J. Cardamone
Dolores DelBello
Michael M. Kirsch
Victor A. Kovner
Honorable Felice K. Shea
Honorable Isaac Rubin
Carroll L. Wainwright, Jr.

The respondent, Norman H. Shilling, a judge of the Civil Court of the City of New York, was served with a Formal Written Complaint dated June 4, 1979, alleging that he improperly interfered in the course of a proceeding before another judge and that he lent the prestige of his office to advance the interests of a third party, a not-for-profit corporation with which he was associated. Respondent filed an answer dated June 22, 1979.

Appendix—Determination

By order dated September 4, 1979, the Commission designated the Honorable James Gibson referee to hear and report with respect to the issues herein. Pursuant to Section 44, subdivision 4, of the Judiciary Law, respondent waived confidentiality in this proceeding and requested that any hearing be public.

By notice of motion dated September 19, 1979, respondent moved to dismiss the Formal Written Complaint for failure to state a cause of action. By order dated October 26, 1979, the Commission denied the motion.

A public hearing was held on October 29, 30, and 31 and November 1, 1979, and the report of the referee was filed on January 23, 1980.

By notice of motion dated February 1, 1980, the administrator of the Commission moved to confirm the referee's report and for a determination of misconduct and sanction. Respondent's opposition papers were filed on February 7, 1980.

The Commission heard oral argument on the issues herein on February 26, 1980. Thereafter, in executive session, the Commission considered the record of this proceeding, and now upon that record makes the following findings of fact.

1. In December, 1977, three summonses were issued against Mr. John Esteves, an employee of Associated Humane Societies of New Jersey (A.H.S.), who manages the A.H.S. facility at 224 Atlantic Avenue, Brooklyn, New York.

2. One summons was issued by the New York City Department of Health, charging operation of the Atlantic Avenue facility without a permit. The other two summonses were issued by agents of the American Society for the Prevention of Cruelty to Animals (A.S.P.C.A.), charging lack of health certificates for dogs shipped from New Jersey to New York, and lack of single cages for dogs over three months old.

3. Between December 1977 and December 1978, respondent contacted Dr. John Kullberg, Executive Director of the A.S.P.C.A., and Eric Plasa, Director, Humane Law Enforcement of the A.S.P.C.A.

4. In his telephone conversation with Dr. Kullberg, respondent identified himself as a judge and requested that Dr. Kullberg intercede and have the A.S.P.C.A. summonses dropped and the charges dismissed. Dr. Kullberg declined, and offered instead to have his agents make an unannounced visit to the A.H.S. facility, but respondent requested a visit with notice.

5. In his telephone conversation with Eric Plasa, respondent also asked for dismissal of the charges against Mr. Esteves.

6. Respondent also contacted Dr. Alan Beck of the New York City Department of Health, Bureau of Animal Affairs, and Dr. Howard Levin, Chief Veterinarian of the City Department of Health.

7. In his telephone conversations with Dr. Beck, respondent identified himself as a judge and questioned why the permit was not being granted to A.H.S. Dr. Beck told respondent that he was doubtful as to the wisdom of having New Jersey animals brought into New York City and vice versa, because of health, social and administrative problems. Respondent dismissed Dr. Beck's argument, became angry, and yelled and screamed at Dr. Beck to such an extent that Dr. Beck was not able to keep the phone to his ear.

8. In a subsequent telephone call to Dr. Beck, respondent was angry that the permit still had not been issued to A.H.S. Dr. Beck explained that the site was not zoned for a kennel, and respondent yelled, screamed and said

that Dr. Beck should "stop f-----g around with the Humane Society."

9. Respondent reminded Dr. Beck at least twice that respondent was a judge and also told Dr. Beck that he had more political clout than Dr. Beck. Dr. Beck perceived the telephone calls to be fraught with "attempted intimidation."

10. In his telephone conversation with Dr. Levin, respondent identified himself as a judge and asked, in a loud voice, to have the permit issued to A.H.S. Respondent questioned the reasons for the summons. He was upset and angry, and accused the Department of abusing its authortiy. Dr. Levin perceived respondent's tone of voice as "threatening."

11. On July 10, 1978, the case of *A.S.P.C.A. and New York City Department of Health* v. *Esteves* came before Judge Eugene Nardelli, sitting at New York City Criminal Court in Manhattan. After the case had been called, and while a settlement discussion was in progress at the bench, Judge Nardelli saw respondent sitting in the rear of the courtroom.

12. During the course of the settlement negotiations, Harry Brown, attorney for A.H.S. and Mr. Esteves, mentioned that respondent sat on the board of A.H.S.

13. After the *Esteves* matter was adjourned, respondent approached the bench and commented to Judge Nardelli about the case, to the effect that if the A.S.P.C.A. and Department of Health were really interested in animals, they would not be proceeding in such a manner. Judge Nardelli did not respond.

14. Respondent did not consider the impropriety of entering another judge's courtroom during the pendency of a case in which he was interested and talking to the presiding judge about the matter.

15. When the persons involved in the *Esteves* case left the courtroom, respondent also left. In the corridor, Mr. Brown introduced respondent to Dr. Levin. Respondent spoke to Dr. Levin about the permit and why it was being stopped. Dr. Levin replied that the problem was a zoning one. Respondent stated that zoning was not relevant, and that he had obtained this information from the building department. When Ms. Elinor Molbegott, attorney for the A.S.P.C.A., stated, "We will check into that," respondent said, "Listen, I am a judge of the Civil Court. When I make a statement of fact, it's a fact."

16. At the time of this conversation, respondent was angry and was talking in a loud tone of voice and waving his arms. Ms. Molbegott testified that respondent also made reference to "political friends." Dr. Levin considered respondent's tone to be "authoritative," perhaps "menacing."

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 33.1, 33.2(a), 33.2(c), 33.5(a) and 33.5(c)(1) of the Rules Governing Judicial Conduct and Canons 1, 2, 5A and 5C of the Code of Judicial Conduct. The charge in the Formal Written Complaint is sustained, and respondent's misconduct is established.

It was improper for respondent (i) to intercede in the *Esteves* case by attempting to persuade two officials of the A.S.P.C.A. with law enforcement authority to withdraw the summonses which commenced the proceeding and to have identified himself as a judge while so doing, (ii) to interfere on behalf of the A.H.S. with officials of the New York City Department of Health as to their decision not to issue a permit to A.H.S., to have identified himself as a

judge while so doing, and to have addressed the City officials in a hostile, profane and loud manner, (iii) to speak in a loud voice in the courthouse corridor with the attorney for the A.S.P.C.A. and to make reference to political influence, and (iv) to interfere in the court's consideration of the *Esteves* case by speaking to the presiding judge on behalf of the defendants. Judge Nardelli appropriately did not respond or allow himself to be engaged in conversation with respondent on this matter.

Respondent has exhibited a disturbing disregard of the ethical obligations required of all judges. He has used the prestige of his office to assert special influence on behalf of a third party and brought disrepute to the judiciary by his vulgar and abrasive public manner.

Respondent has shown little or no understanding of the standards of demeanor incumbent upon all judges as expressed in the Rules Governing Judicial Conduct. A judge's obligation to adhere to those standards is not limited to the courtroom. *Matter of Kuehnel* v. *State Commission on Judicial Conduct*, —NY2d— (Mar. 18, 1980).

The Commission finds the blatant impropriety respondent has evinced to be seriously compounded by his refusal in this record to acknowledge that his actions even appeared improper. Respect for the judiciary has been diminished both by respondent's conduct and the appearance of impropriety thereby engendered.

By reason of the foregoing, the Commission determines that the appropriate sanction is censure.

All concur.

CERTIFICATION

This is to certify that the foregoing is the determination of the State Commission on Judicial Conduct, containing findings of fact and conclusions of law required by Section 44, subdivision 7, of the Judiciary Law.

/s/ LILLEMOR T. ROBB
Lillemor T. Robb, Chairwoman
New York State Commission on
Judicial Conduct

Dated: April 9, 1980
Albany, New York

Appendix--Order

Order Rejecting The Determination

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the 25th day of November A. D. 1980

PRESENT, HON. LAWRENCE H. COOKE, *Chief Judge, presiding.*

SCJC No. 488

In the Matter of Norman H. Shilling, a Judge of the Civil Court of the City of New York, Kings County,

Petitioner,

For Review of a Determination of State Commission on Judicial Conduct,

Respondent.

The State Commission on Judicial Conduct determined on April 9, 1980, that Norman H. Shilling should be censured;

That determination of the Commission, its findings of fact, its conclusions of law, and the record of the proceedings upon which the determination is based were transmitted on April 9, 1980 to the Chief Judge of the Court of Appeals in accordance with subdivision (a) of section 22 of Article 6 of the New York State Constitution and with Judiciary Law, Section 44, subdivision 7;

The service and notice requirements of New York State Constitution, Article 6, Section 22, subdivision (a) and of

Judiciary Law, Section 44, subdivision 7, were complied with on April 9, 1980 by certified mail, return receipt requested;

A request for review was made on April 15, 1980; this proceeding was heard by the Court on October 8, 1980; Now THEREFORE, in accordance with Article 6, Section 22, subdivision (d) of the New York State Constitution and with Judiciary Law, Section 44, subdivision 9, after due deliberation, it is

ORDERED that the determined sanction is rejected, without costs, the sanction of removal imposed and Norman H. Shilling removed from his office of Judge of the Civil Court of the City of New York, effective at midnight December 31, 1980, and, during the period between the date of service upon him of a copy of the order to be entered herein and December 31, 1980, he is suspended, with pay, from office except to the extent necessary to complete matters begun but not completed by him at the time of such service.

Opinion Per Curiam.

All concur except Fuchsberg, J., who dissents and votes to accept the determined sanction in an opinion.

/s/ JOSEPH W. BELLACOSA
Joseph W. Bellacosa
Clerk of the Court

November 25, 1980

Mtr. of Shilling
Order of Removal

Appendix—Order

Order Imposing Sanction of Removal

COURT OF APPEALS
STATE OF NEW YORK

The Hon. Lawrence H. Cooke, Chief Judge, Presiding

SCJC No. 488

In the Matter of Norman H. Shilling, a Judge of the Civil Court of the City of New York, Kings County,

Petitioner,

For Review of a Determination of State Commission on Judicial Conduct,

Respondent.

The petitioner *in the above entitled appeal appeared by* Stanley D. Steinhaus; *the respondent appeared by* Gerald Stern, State Commission on Judicial Conduct.

The Court, after due deliberation, orders that the determined sanction is rejected, without costs, the sanction of removal imposed and Norman H. Shilling removed from his office of Judge of the Civil Court of the City of New York, effective at midnight December 31, 1980, and, during the period between the date of service upon him of a copy of the order to be entered herein and December 31, 1980, he is suspended, with pay, from office except to the extent necessary to complete matters begun but not completed by him at the time of such service. Opinion Per Curiam. All concur except Fuchsberg, J., who dissents and votes to accept the determined sanction in an opinion.

It is further ordered that the record of the proceedings be filed with the Clerk of this Court.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

/s/ JOSEPH W. BELLACOSA
Joseph W. Bellacosa, Clerk of the Court

Court of Appeals, Clerk's Office, Albany, November 25, 1980